83-573

NO. 83-498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT

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Dated: September, 1983

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Questions Presented

1. Does the National Labor Relations Act prohibit New Jersey from imposing certain disqualification criteria on officials of casino industry labor unions, where such criteria are an essential part of a broad regulatory scheme designed to foster the vital state interest in protecting the integrity of the casino industry?

2. Should the federal courts abstain from exercising jurisdiction over a suit seeking to enjoin an ongoing state administrative proceeding, where the state proceeding was brought by the New Jersey Attorney General in furtherance of New Jersey's vital interest in maintaining the integrity of its casino industry?[1]

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[1] The following are the parties to the United States Court of Appeals proceeding from which this appeal is taken: Hotel and Restaurant Employees and Bartenders International Union Local 54; Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54; New Jersey Casino Control Commission; Martin Danziger, Acting Chairman; Don Thomas, Commissioner; Madeline McWhinney, Commissioner; Carl Zeitz, Commissioner; State of New Jersey Department of Law and Public Safety, Division of Gaming Enforcement; G. Michael Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement; Thomas Kean, Governor, State of New Jersey; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Section 331.

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JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F. 2d 815 (3 Cir. 1983) and is reproduced in the joint appendix of appellants as Appendix A. The opinion of the United States District Court for the District of New Jersey is reported at 536 F. Supp. 317 (D.N.J. 1982) and is reproduced as Appendix B. The opinion and supplemental opinion of the New Jersey Casino Control Commission are unreported and are reproduced as Appendices D and F.

Jurisdiction

These proceedings involve a claim that section 93 of the New Jersey Casino Control Act N.J. Stat. Ann. §5:12-93 (West Supp. 1983) is invalid under the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI cl. 2, because it is preempted by federal labor legislation. The District Court found that federal jurisdiction was properly invoked under 28 U.S.C. §1331 (West Supp. 1983) and 28 U.S.C. §1337 (West Supp. 1983) (App. B, 90a).

Plaintiffs, a labor union and its president, moved for a preliminary injunction against enforcement of section 93. Defendants, the New Jersey officials charged with implementation of the Casino Control Act, moved to dismiss the complaint on the ground of abstention. The District Court denied both motions. Plaintiffs appealed to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a)(1) (West Supp. 1983), and defendants cross-appealed

On June 6, 1983, by a two to one vote, the Court of Appeals declared section 93 invalid (App. A, 31a; 33a)

and entered judgment reversing the denial of the preliminary injunction, remanding for further proceedings, and dismissing the cross-appeals for lack of jurisdiction (App. G). Although the Court dismissed the cross-appeals, it considered the issue raised on the cross-appeals, abstention, as a possible ground for upholding the District Court's denial of the preliminary injunction, and determined the issue on its merits against defendants (App. A, 13a).

The Honorable Edward Becker, Circuit Judge, dissented, contending that section 93 is not preempted. Judge Becker also contended that the court had jurisdiction over the cross-appeals, stating: "Since injunctive relief should not be granted if abstention is required, it seems quite clear that the propriety of abstension is inextricably bound with the review of a decision to grant or to deny preliminary injunctive relief" (App. A, 40a, n.2). *See also,* 9 *Moore's Federal Practice,* §110.25 at 271 (2 ed. 1970); *Kershner* v. *Mazurkiewicz,* 607 F. 2d 440 (3 Cir. 1982); *Genosick* v. *Richmond United School District,* 479 F. 2d 482, 483 (9 Cir. 1973).

Defendants petitioned for rehearing *in banc* on June 20, 1983. The petition was denied by an evenly divided Court on June 30, 1983. Defendants filed notices of appeal to this Court on July 18 and August 3, 1983 (App. I).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2) (1966). Although the Court of Appeals remanded for further proceedings, presumably the issuance of a permanent injunction, it is clear that the unconstitutionality of section 93 has been definitely and finally adjudicated, that New Jersey has been enjoined from enforcing the statute, and thus that the present appeal lies under §1254(2). *City of New Orleans* v. *Dukes,*

427 U.S. 297, 301-302 (1976). The statute having been declared unconstiutional, the entry of the permanent injunction by the District Court would be a mere formality.

In addition, there are claims in Plaintiffs' complaint which were not adjudicated by the Court of Appeals. There is a claim that section 93 is violative of the First Amendment, which the Court declined to address because it had found the statute unconstitutional on preemption grounds (App. A, 37a). There is also a claim for money damages, as to which there is a motion to dismiss on the ground of sovereign immunity pending in the District Court. However, it is clear that the First Amendment question is now moot and that the damage claim has no bearing on the constitutionality of section 93. Thus, as the Court said in *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 302, "the policy underlying §1254(2)—ensuring that state laws are not erroneously invalidated—will in no way be served by further delay in adjudicating the constitutional issue presented."

It is therefore respectfully submitted that the preemption issue, and the abstention issue which is inextricably bound therewith, are properly before this Court.

Constitutional Provisions and Statutes Involved

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing

in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), provides in pertinent part:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually. . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal em-

> ployee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

The full text of section 93 is reproduced in Appendix N. Other relevant statutes are reproduced in Appendices J through O.

Statement of the Case

In November 1976 the voters of New Jersey approved an amendment to the state consitution permitting casino gambling within the municipality of Atlantic City. N.J. Stat. Ann. Const. (1947), Art. 4, §7, par. 2D (West Supp. 1983). In June 1977 the state Legislature adopted the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-1 *et seq.* (West Supp. 1983) (the Act), which put in place an extraordinarily pervasive and intensive system of regulation of the nascent Atlantic City casino industry.

An integral part of that regulatory system is embodied in section 93 of the Act. N.J. Stat. Ann. 5:12-93 (West Supp. 1983) (App. N). Section 93 requires labor organizations which represent or seek to represent persons employed in casinos or casino hotels to register annually with Appellant New Jersey Casino Control Commission (Commission). Section 93 further provides that no labor organization which is registered or required to be registered may receive dues from casino industry workers, or administer pension or welfare funds, if any "officer, agent or principal employee" of such labor organization is disqualified under

section 86 of the Act. N.J. Stat. Ann. 5:12-86 (West Supp. 1983) (App. O). Section 86 enumerates certain disqualifying criteria applicable to persons involved in the ownership, financing, management and operation of casino hotels, persons who do business with casino hotels, as well as officers, agents and principal employees of labor organizations covered by section 93. Among the disqualifying criteria of section 86 are the commission of certain criminal offenses, N.J. Stat. Ann. 5:12-86(c) (West Supp. 1983), and associations with members of organized crime if such associations are found by the Commission to be inimical to the policies of the Act and to gaming operations. N.J. Stat. Ann. 5:12-86(f) (West Supp. 1983).

Appellee Hotel and Restaurant Employees and Bartenders International Union Local 54 (Local 54) is the largest union operating in the New Jersey casino industry, and has registered under section 93. Following Local 54's registration, Appellant New Jersey Division of Gaming Enforcement (Division), a division of the Office of the New Jersey Attorney General, conducted an investigation and filed reports with the Commission in which it alleged that certain officials of Local 54 were disqualified under section 86 and requested the Commission to take appropriate remedial action under section 93. The Commission scheduled a hearing on the Division's allegations.

Local 54 filed a complaint in the Federal District Court for the District of New Jersey, alleging that sections 86 and 93 are unconstitutional and seeking, *inter alia*, to enjoin the Commission and the Division from enforcing these sections against it. The District Court denied Local 54's request for a preliminary injunction, and also denied the motions of the Commission and the Division to dismiss the complaint on the ground of abstention (App. B). Local 54 appealed the District Court's order denying the prelimi-

nary injunction to the United States Court of Appeals for the Third Circuit, and the Commission and the Division cross-appealed, alleging that the District Court erred in refusing to abstain from exercising jurisdiction.

During the pendency of the appeal and cross-appeals, the Commission held a hearing on the allegations in the reports filed by the Division. Following the hearing, the Commission found that three officials of Local 54 were disqualified under section 86, two because they are associated with members of organized crime and conduct union affairs under the influence of those criminal associates, and the third because of a criminal conviction for interference with commerce (extortion), aiding and abetting and conspiracy (App. D). The Commission ordered the removal of these three officials and stated that, if they were not removed, Local 54 would be prohibited from collecting dues from workers in the Atlantic City casino industry (App. E). The Commission determined not to utilize the alternative statutory remedy of prohibition of pension and welfare fund administration, noting that the dues prohibition remedy was sufficient to effect the removal of the disqualified officials, which is the statute's only intent and the Commission's only objective (App. F, 212a-215a).

Following the Commission's decision and order, the United States District Court issued an order enjoining the Commission and the Division from taking any steps to enforce section 93 against Local 54 pending resolution of the appeal and cross-appeals in the United States Court of Appeals (App. C).

The Court of Appeals reversed the denial of the preliminary injunction. The majority of the Court ruled that section 93 is preempted by section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973), insofar as it empowers the Commission to disqualify elected union officials

(App. A, 31a), and is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1381 (1975), insofar as it empowers the Commission to prohibit administration of pension and welfare funds (App. A, 32a-33a). The majority also held that the Court was without jurisdiction over the cross-appeals, but considered the abstention arguments advanced by the Commission and Division as a possible alternative ground for upholding the denial of the preliminary injunction. The majority ruled that the District Court did not err in declining to abstain (App. A, 36a-37a).

The Honorable Edward Becker, Circuit Judge, dissented. Although Judge Becker agreed with the majority that the section 93 remedy relating to pension and welfare fund administration is preempted by the Employee Retirement Income Security Act (App. A, 38a), he found that section 93 is otherwise valid. Based on his analysis of congressional labor policy and "in view of the colossal problems associated with casino gambling, and New Jersey's interest in preventing the incidence of such problems and the poisoning of its polity," Judge Becker concluded that "federal labor law does not preempt the Casino Control Act's restrictions on the right of casino-industry employees to select certain individuals as union officials" (App. A, 42a-43a). Judge Becker also dissented from the ruling that the Court was without jurisdiction over the cross-appeals (App. A, 40a, n.2), but agreed that abstention is inappropriate in this case (App. A, 42a, n.3).

The Commission and the Division petitioned the Court of Appeals for a rehearing *in banc*. The Court, by vote of five to five, denied the petition (App. H). The Honorable Arlin Adams, Circuit Judge, who voted to deny the petition, issued the following statement sur petition for rehearing:

This appeal presents an extremely important issue concerning the proper balance of state and federal authority over labor unions in the casino industry, an industry which by its very nature must be regulated carefully and perhaps extensively by state governments. The decision of this Court not to rehear the matter *in banc*, should not be taken as a sign that it considers the matter unworthy of careful scrutiny by the full Court. Rather, I believe that the determination not to consider the case *in banc* may be understood as an acknowledgement of the thorough discussion set forth in the majority and dissenting opinions which have laid out the arguments for each side in considerable detail.

Because this appeal raises a question central to the concept of federalism, it would appear most appropriate, at least to me, that it be addressed at the first opportunity by the Supreme Court, so that all federal courts would have the benefit of guidance of the nation's highest tribunal on this crucial topic. Given the magnitude of a state's interest in regulating an industry such as the casino industry, and the contention vigorously advanced that such regulation does not inexorably stand as an obstacle to the purposes and objectives of the Congress in the labor area, whether the National Labor Relations Act preempts a provision such as section 93 of the Casino Control Act would seem a question worthy of full exploration by the Supreme Court. (App. H, 222a-223a)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

POINT I

The ruling below, that New Jersey is powerless to prevent the subversion of its casino industry through criminal infiltration of the industry's labor organizations, is based on a misapprehension of the doctrine of federal preemption.

Section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973), provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing. . . .

At issue in the present case is whether section 7 preempts section 93 of the Casino Control Act.[2]

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, mandates preemption of any state law which "stands as an obstacle to the objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). However, the "exercise of federal supremacy is not lightly to be presumed," *New York State Dep't of Social Serv.* v. *Dublino*, 413 U.S. 405,

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[2] The question whether the section 93 remedy relating to pension and welfare fund adminstration is preempted by the Employee Retirement Income Security Act need not have been addressed by the Court of Appeals and need not be addressed by this Court, because that remedy was not invoked by the Commission. In addition, in view of the broadly-framed severability clause of the Casino Control Act, N.J. Stat. Ann. 5:12-133(a) (West Supp. 1983), it is clear that this remedy, should it ultimately be found unconstitutional, could be severed without altering the character or purpose of section 93.

413 (1973), and, indeed, it is not favored in the absence of a persuasive showing that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordered. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

Congress has refrained from providing any specific direction with respect to the preemptive effect of the National Labor Relations Act. *See Farmer* v. *Carpenters Local 25*, 430 U.S. 290, 295 (1977). This Court has therefore developed a preemption doctrine based primarily on two competing considerations—the need for uniform national labor regulation under the NLRA, and the recognition that state regulation of activity which is merely a peripheral concern of the NLRA, or which touches interests deeply rooted in local feeling and responsibility, must be allowed to stand. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 233-244 (1959); *Farmer* v. *Carpenters Local 25, supra*, at 295-296. Most recently, in *Local 926, Inter. Union of Oper. Eng.* v. *Jones*, —— U.S. ——, 103 S. Ct. 1453, 1458-1459 (1983), the Court reiterated its approach to NLRA preemption issues as follows:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. *Garmon, supra*, 359 U.S., at 245, 79 S. Ct., at 779; [other citations omitted]. Although the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion", *Sears, Roebuck & Co.* v. *Carpenters*, [436 U.S. 180] at 188, 98 S. Ct., [1745] at 1752 [(1978)], if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily preempted. *Farmer, supra*, 430 U.S., at 296, 97 S. Ct., at 1061. When, however, the con-

> duct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. *Garmon, supra,* 359 U.S., at 243-244, 79 S. Ct., at 778.

In the present case the majority of the Court of Appeals misapprehended the applicable Supreme Court law, and ruled that where it is clear or may fairly be assumed that activity which a state seeks to regulate is protected by section 7, preemption "is absolute," and that in such cases "there is neither occasion nor justification for engaging in weighing or balancing" of competing federal and state interests (App. A, 27a-28a). The majority further concluded that such weighing and balancing are only required where the conduct which the State seeks to regulate is not protected by section 7, "but is nevertheless federally regulated" (App. A, 27a).

As Judge Becker pointed out in his dissent, the majority's formulation is based on an inaccurate distinction and an oversimplification of the proper preemption analysis (App. A, 44a). Judge Becker engaged in the weighing and balancing which the majority refused to perform. Clearly, Judge Becker's approach to the preemption analyses was the correct one. As this Court explained in *Local 926, Inter. Union of Oper. Eng.* v. *Jones, supra,* 103 S. Ct. at 1458:

> The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause

> of action to the state as a protection to its citizens. See *Sears, supra,* 436 U.S., at 188-89, 98 S. Ct., at 1752; *Farmer, supra* 430 U.S., at 297, 97 S. Ct., at 1061.

The correctness of Judge Becker's approach is made even more manifest by reference to *DeVeau* v. *Braisted,* 363 U.S. 144 (1960), where the Court upheld a statute remarkably similar to section 93. *DeVeau* involved a challenge to section 8 of the New York Waterfront Commission Act, McK. Unconsol. Laws, §6700aa *et seq.,* which prohibits the collection of dues from waterfront employees by any union with an officer or agent who has been convicted of a felony and has not been pardoned or granted a "certificate of good conduct." In upholding the statute, Justice Frankfutrer (plurality op.), at 152, stated:

> The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers.

When the required balancing of the federal and state interests involved in the present case is performed, the result must be the same as that reached in *DeVeau* and by Judge Becker, *i.e.,* that section 93 of the Casino Control Act is not preempted by section 7 of the NLRA.

Judge Becker concluded that the concerns of New Jersey's Legislature and citizenry embodied in section 93 "cannot be characterized as anything less than 'deeply rooted in a local feeling and responsibility'" (App. A, 72a). The District Judge had reached the same conclusion in his opin-

ion (App. B, 106a). Indeed, this conclusion is manifest in light of the history and purpose of section 93.

As Judge Becker noted, gambling has been described by the FBI as the "lifeblood of organized crime" (App. A, 65a), and legalized casino gambling, where millions of dollars continually change hands in thousands of unrecorded cash transactions, is uniquely susceptible to criminal infiltration (App. A, 66a). This susceptibility, combined with the well-known history of organized crime involvement in casino gambling in other jurisdictions, led the citizens of New Jersey to defeat a 1974 referendum to allow casino gambling. The 1976 referendum was passed only after the people of New Jersey were promised the "strongest regulations of casinos in the world" (App. A, 66a).

Following voter approval, the New Jersey Legislature conducted extensive hearings, at which it was demonstrated that the integrity of the casino industry and public confidence in the regulatory process could only be assured through the strictest regulation of casinos and of all ancillary activities. In the words of the Governor's staff policy group on casino gaming: "The uniqueness of the industry, taken with its potential societal consequences and its checkered history in other jurisdictions, compels a state regulatory interest in virtually every aspect of casinos and related operations" (App. A, 67a). The statutory and administrative controls which the Legislature put in place have been described by the New Jersey Supreme Court as "extraordinary pervasive and intensive," *Knight* v. *City of Margate*, 86 N.J. 374, 381, 431 A.2d 833, 836 (1981), and as designed to regulate all aspects of the casino industry with the "utmost strictness." *Id.*, 86 N.J. at 392, 431 A.2d at 842; *Bally Manufacturing Corp.* v. *N.J. Casino Control Commission*, 85 N.J. 325, 426 A.2d 1000 (1981), appeal dism. 454 U.S. 804 (1981); *In re Martin, et al.*, 90 N.J. 295, 447 A.2d 1290 (1982).

During the hearing process, the Legislature was specifically advised by the New Jersey State Commission of Investigation that there are "few better vehicles" for organized crime to gain a stronghold in the casino industry than through labor racketeering (App. A, 69a). It is therefore not surprising that the Legislature included section 93 in the Casino Control Act. Section 93 is an essential and integral part of New Jersey's overall effort to regulate its casino industry, and the policies embodied in section 93 cannot be characterized as anything less than deeply rooted in local feeling and responsibility. Had the majority of the Court of Appeals considered the question, surely it, like the dissent, would have so concluded.

It is equally clear that section 93 does not represent a disruption of federal labor policy. Section 93 applies to a single, unique, local industry. In addition, as the Court ruled in *DeVeau* v. *Braisted,* with respect to section 8 of the Waterfront Commission Act, section 93 does not contradict any federal labor enactment and can operate in harmony with federal labor policy. Like section 8 of the Waterfront Commission Act, section 93 does not deprive workers of the right to choose bargaining representatives, but merely restricts their right to choose insofar as necessary to protect them from being represented by convicted criminals and persons who conduct union affairs under the influence of organized crime. *Cf. DeVeau* v. *Braisted, supra,* 363 U.S. at 152.

Congress itself has expressly recognized the danger of criminal infiltration of the labor movement, by adopting section 504(a) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §504(a) (1975), which prohibits individuals convicted of certain felonies from holding union office for five years. Sections 93 and 86 of the

Casino Control Act do not contradict section 504, although they include more disqualifying criteria, N.J. Stat. Ann. 5:12-86(b) through (h) (West Supp. 1983), and extend the period of disqualification to 10 years N.J. Stat. Ann. 5:12-86(c)(4) (West Supp. 1983). Rather, as Judge Becker pointed out, sections 93 and 86 support the congressional policy of stamping out crime and corruption in unions and guarantying internal union democracy (App. A, 58a). The casino industry, by its very nature, is uniquely susceptible to criminal infiltration, and has a long history of criminal involvement. It is clear from the purpose and legislative history of section 504(a) that the imposition of more restrictive eligibility requirements to this unique, localized industry is complimentary, not contradictory, to the Labor Management Reporting Disclosure Act (App. A, 55a-59a).

Indeed, in section 603(a) of the LMRDA, 29 U.S.C. §523(a) (1975), Congress provided that "nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward or other representative of a labor organization . . . under the laws of any State." Although the majority in the present case said that section 603(a) only applies to state law remedies for breach of fiduciary duties by union officials (App. A, 24a-27a), the dissent pointed out that there is no support for such a restrictive reading in the legislative history. The dissent further noted that in *DeVeau* v. *Braisted, supra,* Justice Frankfurter, speaking for the plurality, and Justice Brennan, who provided the fifth vote to uphold section 8 of the Waterfront Commission Act, expressly stated that section 603(a) applies to section 504(a) (App. A, 57a-58a). In fact, Justice Frankfurter said that, in view of section 603(a), "no inference could possibly arise that section 8 is impliedly preempted by section 504(a)." *DeVeau* v. *Braisted, supra,* 363 U.S. at 157.

The majority opinion of the Court of Appeals dismissed *DeVeau* out of hand because the Waterfront Commission Act was embodied in a New York-New Jersey bistate compact which was approved by Congress (App. A, 28a-29a). The majority noted that the *DeVeau* Court, in ruling that section 8 of the Waterfront Commission Act is not preempted by section 7 of the NLRA, relied on the specific expression of congressional intent embodied in the approval of the compact. However, the Court in *DeVeau* at no time indicated that, absent the bistate compact, it would have found section 8 of the Waterfront Act invalid, and the opinion, read as a whole, compels the opposite conclusion. The *DeVeau* Court performed the balancing of federal and state interests which the majority in the present case eschewed, and found that section 8 could exist in harmony with the NLRA.

Nevertheless, the majority in the present case ignored *DeVeau* and placed its primary reliance on *Hill* v. *Florida*, 325 U.S. 538 (1945). In *Hill* the Court reviewed a Florida statute which required union business agents to obtain a license from the state. The license could be denied to anyone who had not been a citizen for more than 10 years, who had been convicted of a felony, or who was not of good moral character. Criminal penalties could be imposed on anyone who functioned as a business agent without a license. This Court ruled that the informational filings required by the statute were not unconstitutional, but that the misdemeanor penalty was unconstitutionally broad because it infringed upon the right of unions to act as collective bargaining representatives. *Id.* at 543.

In contrast to section 93, the statute invalidated in *Hill* applied to *all* labor unions operating in Florida. The statute was broadly written, imposing such standards as "good moral character." The statute, unlike

section 93 and section 8 of the Waterfront Commission Act, was not part of an overall legislative scheme designed to address a specific and vital state interest.

In addition, *Hill* was decided prior to the express manifestations of congressional policy apparent in the adoption of section 504(a) of the LMRDA and approval of the bistate compact involved in *DeVeau*. In light of these later expressions of national labor policy, Judge Becker disagreed "with the majority's conclusion that the *Hill* Court's reading of congressional intent remains either definitive or controlling" (App. A, 47a-48a). The continuing validity of *Hill* has also been questioned elsewhere. *Fitzgerald* v. *Catherwood*, 388 F. 2d 400, 406 (2 Cir. 1968) *cert.* den. 391 U.S. 934 (1969). At any rate, the question of it validity aside, *Hill* is clearly distinguishable from the present case.

In summary, Appellate Casino Control Commission respectfully submits that the Court of Appeals erroneously invalidated section 93 of the Casino Control Act, thereby depriving New Jersey of an essential weapon in the battle to maintain the integrity of its casino industry. In addition to the vital interests of the State of New Jersey at stake, this case also presents broader questions meriting this Court's attention. The majority opinion of the Court of Appeals announces a new and potentially far-reaching theory of absolute NLRA preemption, which runs counter to this Court's consistent policy and requires immediate correction.

It is clear, as Judge Adams said in his statement sur petition for rehearing (App. H), that this appeal "presents an extremely important issue concerning the proper balance of state and federal authority over labor unions . . . ." In Judge Adams' view, and in the view of the

Commission, this is "a question central to the concept of federalism," meriting full exploration by this Court "so that all federal courts would have the benefit of guidance of the nation's highest tribunal on this crucial topic."

POINT II

The opinion of the Court of Appeals announces a new and wholly unjustified exception to the doctrine of abstention.

The Appellants moved before the District Court to dismiss the complaint in this matter on the ground of abstention, raising, *inter alia*, the abstention doctrine first enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine, as developed in such subsequent cases as *Moore* v. *Sims*, 422 U.S. 415 (1979); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Juidice* v. *Vail*, 430 U.S. 327 (1977) and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), estabishes that, absent extraordinary circumstances, federal courts will not interfere with ongoing state proceedings brought to vindicate important state interests. Although *Younger* involved a request to enjoin an ongoing state criminal proceeding, it is now clear that the *Younger* doctrine is "fully applicable to civil proceedings in which important state interests are involved," *see Moore* v. *Sims, supra; Middlesex County Ethics Committee* v. *Garden State Bar Association*, 454 U.S. 962 (1982), including state administrative proceedings that "command the respect due court proceedings." *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973); *Geiger* v. *Jenkins*, 401 U.S. 985 (1971).

It is clear beyond question that important state interests are involved in the proceedings initiated before the Com-

mission. It is also clear that the proceedings before the Commission were conducted in a trial-type atmosphere with the full panoply of due proces rights. *See* N.J. Stat. Ann. 5:12-107 (West Supp. 1983).

It is true that Local 54 was not afforded the opportunity to test the constitutionality of section 93 of the Casino Control Act during the administrative proceedings, the Commission having ruled that it lacks power as an administrative agency to rule on the constitutionality of its enabling statute. However, the state court system is fully competent to address the constitutional issues. Pursuant to N.J. Ct. R. 2:5-6, Local 54 could have applied for leave to appeal to the New Jersey Superior Court, Appellate Division, from the Commission's interlocutory decision declining to rule on the constitutionality of the statute. Moreover, the Casino Control Act, N.J. Stat. Ann. §5:12-110(a) (West Supp. 1983), and the New Jersey Court Rules, N.J. Ct. R. 2:2-3(a)(2), insure the right of appeal to the Superior Court, Appellate Division from the final decision of the Commission. In fact, Local 54 has appealed to the Appellate Division and has raised its constitutional arguments on that appeal. At Local 54's request, that appeal was dismissed without prejudice after the issuance of the Third Circuit opinion. However, it is clear that the State has provided "a forum competent to vindicate any constitutional objections" which Local 54 seeks to raise, and therefore that federal court intervention is unwarranted. *Huffman* v. *Pursue, supra,* 420 U.S. at 604.

Where, as here, the trial phase of the state proceedings has been completed, federal court intervention is particularly inappropriate, because it deprives the state of its legitimate function of providing appellate court review. The principles of comity and federalism which

underly *Younger* are ill served when federal courts substitute themselves for state appellate courts. As this Court noted in *Huffman* v. *Pursue, supra,* 420 U.S. at 608-609, such intervention is even more disruptive and offensive than pre-trial intervention by federal courts, and is "also a direct aspersion on the capabilities and good faith of state appellate courts."

In the present case the Federal District Court declined to apply *Younger* abstention because "the state proceedings have not been initiated by the state itself" (App. B, 91a). On appeal, the Commission and Division argued that the proceedings against Local 54 clearly were initiated by the state, and that, in any event, the controlling consideration is the presence of an important state interest, not initiation by the state.

The Circuit Court also declined to apply *Younger* abstention, but did not mention the "state initiation" test utilized by the District Court. Rather, both the majority and dissenting opinions of the Circuit Court reasoned that the principles of *Younger* are not applicable here because Local 54 challenged the state's right to maintain the administrative proceedings. In the words of the majority:

> . . . when the issue tendered to the federal district court is the very power, as a matter of federal law, to entertain a threatened proceeding, the principles of comity and federalism which apparently animate the *Younger* v. *Harris* rule are totally inapplicable. (App. A, 36a-37a).

The dissent essentially agreed, stating that while "at first blush, this case appears to fall within the class of cases in which the district courts should abstain from adjudicating the claims at issue," abstention is nonetheless inapplicable here because:

> Where an individual who is subject to state proceedings to which the federal courts would otherwise defer raises a colorable claim that the proceedings themselves constitute a violation of a constitutional or statutory right, the principles of comity and federalism motivating *Younger* are superseded. (App. A, 42a, n.3).

In ruling that the mere assertion that federal law protects against maintenance of the state proceedings renders *Younger* inapplicable, both the majority and the dissent overlooked the fact that *Younger* itself dealt with a First Amendment challenge to the state statute under which a criminal trial was being conducted. Nevertheless, this Court declared that the mere holding of the state proceeding did not constitute irreparable harm justifying equitable relief in federal court. *Younger* v. *Harris, supra,* 401 U.S. at 46, 48-49. In the present case the District Court specifically ruled that the holding of the hearing before the Commission would not constitute irreparable harm (App. B, 107a-108a; 125a-128a), and neither of the opinions in the Court of Appeals expressed any contrary conclusion. It is therefore unclear why the fact of a challenge to the legitimacy of state proceedings justifies federal court intervention in a case otherwise within the purview of *Younger.*

In support of its conclusion, the majority cited *New Jersey-Philadelphia Presbytery* v. *New Jersey State Bd. of Ed.,* 654 F. 2d 868 (3 Cir. 1981), for the proposition that, "absent federal district court intervention, state agency orders which operate as prior restraints upon the exercise of federally protected rights may by virtue of the final judgment rule in 28 U.S.C. §1257 (1966), escape any federal appellate review for long periods" (App. A, 36a). The issue in the *New Jersey-Philadelphia Presbytery* case was

the applicability of *Younger* to a federal suit instituted by persons who were not parties to an ongoing state action. The Court said that where such persons cannot intervene in the state action, and can only protect their interests in a separate action under 42 U.S.C. §1983 (1981), they might legitimately choose the federal forum because the Supreme Court can review interlocutory injunctive orders of lower federal courts but can only review final judgments of state courts. 654 F.2d at 883-884. The *New Jersey-Philadelphia Presbytery* opinion was issued over a vigorous dissent, which pointed out that the majority misperceived the extent of Supreme Court appellate jurisdiction. 654 F.2d at 904-905. At any rate, even the majority opinion in *New Jersey-Philadelphia Presbytery* did not suggest that *Younger* is inapplicable whenever it is claimed that an order of a state court or agency restrains the exercise of some federal right. In fact, *Younger* itself involved a claim that the California Criminal Syndication Act inhibited the exercise of First Amendment rights, 401 U.S. at 784, and the *Younger* opinion does not even mention the possibility that such an allegation could provide a justification for a federal court to enjoin an ongoing state proceeding. To the contrary, *Younger* denounced the implicit denial of the equal ability of the state courts to order a fair and competent determination of federal issues which inheres in such an assertion.

As additional authority, the majority in the present case cited *In re Green's Petition*, 369 U.S. 689 (1962), and *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383 (1951), for the proposition that "the federal policy of preventing state courts from eroding rights guaranteed by section 7 is so important that as a matter of federal law a state court is without power to hold one in contempt for violating an order it had no power to enter" (App. A, 36a). These cases did involve section 7

rights and did hold that "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal preemption." *In re Green's Petition,* 369 U.S. at 694; *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U.S. at 386, 399. However, this was a holding of general applicability and was not related to any particular significance granted section 7 rights. In addition, these cases came to this Court on *certiorari* from the highest courts of the states involved, and did not entail federal intervention in ongoing state proceedings.

Finally, the majority cited *Capitol Service, Inc.* v. *NLRB,* 347 U.S. 501 (1954), and *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138 (1971), for the proposition that "[e]ven pending state proceedings may be enjoined on preemption grounds" (App. A, 36a). Both of these cases involved attempts by the National Labor Relations Board to restrain enforcement of injunctions issued by state courts against peaceful picketing. In both cases the sole issue was whether the so-called Anti-Injunction Act, 28 U.S.C. §2283 (1978), precluded the granting of the requested relief. In *Capitol Services* the Court held that §2283 did not apply because the granting of injunctive relief by the District Court was "necessary in aid of its jurisdiction." 347 U.S. at 506. In *Nash-Finch,* the Court held that suits brought by the NLRB fall within the "suits brought by the United States" exception to §2283. 404 U.S. at 144-147. In neither case was abstention raised or discussed.

The majority of the Court of Appeals stated that the cases discussed above "suggest" that *Younger* is inapplicable where a federal plaintiff challenges the propriety of state proceedings (App. A, 36a-37a). It is respectfully submitted that these cases do not support the conclusion reached by the Court, and that *Younger* itself clearly precludes that conclusion.

The dissent placed its reliance on cases involving claims of double jeopardy (App. A, 42a, n.3). For example, the dissent cited *Abney* v. *United States*, 431 U.S. 651 (1977), holding that a denial of a claim of double jeopardy is an appealable collateral order, and *United States ex rel. Webb* v. *Court of Common Pleas*, 516 F.2d 1034, 1037, (3 Cir. 1975), holding that pretrial *habeas corpus* relief is available to a defendant who seeks to avoid trial on the ground of double jeopardy and whose double jeopardy claims have been denied by the state's highest court. These cases, and the others cited by the dissent, are grounded on the notion that the prohibition of double prosecution for a single offense is intended to spare defendants the embarrassment, expense and ordeal of a second trial. *Abney*, 431 U.S. at 661-662; *Webb*, 516 F.2d at 1040-1041. In *Younger* the Court, in discussing the showing of irreparable harm which is necessary to justify federal injunctive relief against an ongoing state proceeding, stated:

> Certain types of injury, in particular, the cost, anxiety, and inconveninece of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. (401 U.S. at 46).

Thus, the cases cited by the dissent present a unique situation in which a trial itself constitutes an injury against which a defendant is afforded federal constitutional protection, as contrasted with the *Younger* case, and the present case, in which the holding of the state proceeding does not constitute an irreparable injury justifying federal court intervention. The cases cited by the dissent clearly do not support the conclusion that a plaintiff is entitled to federal

relief whenever there is an allegation that some federal constitutional or statutory right entitles him to avoid participating in a pending state proceeding.

In summary, it is respectfully submitted that both the majority and dissenting opinions have announced a novel, ill-conceived, and unsupported exception to the *Younger* rule. If this exception is allowed to stand, and federal plaintiffs can avoid the impact of *Younger* merely by alleging that they should not be subjected to state proceedings, the principles of comity and federalism underlying the *Younger* abstention doctrine will be rendered meaningless.

CONCLUSION

For the reasons stated above, probable jurisdiction should be noted.

Respectfully submitted,

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